

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES INDUSTRIES,)	CV 06-5578 SVW (JCx)
INC., <i>et al.</i> ,)	
)	ORDER GRANTING PLAINTIFFS'
Plaintiffs,)	MOTION FOR SUMMARY JUDGMENT ON
)	LIABILITY [249]
v.)	
)	
GARY FUNG, <i>et al.</i> ,)	
)	
Defendants.)	

I. INTRODUCTION

In September 2006, Plaintiffs¹ filed a Complaint alleging copyright infringement against Defendant Gary Fung ("Fung"). [Doc. No. 1.] Plaintiffs' Complaint contends that Fung operated a file-sharing service as well as related computer servers as a part of an ongoing file-sharing network that profits from alleged copyright infringement

¹The Plaintiffs in this action are: Columbia Pictures Industries, Inc.; Disney Enterprises, Inc.; Paramount Pictures Corporation; Tristar Pictures, Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLLP; Universal City Studios Productions LLLP; and Warner Bros. Entertainment, Inc.

1 by its users. Plaintiffs then filed a First Amended Complaint adding
2 Defendants Isohunt Web Technologies, Inc. ("Isohunt, Inc.") and Does 1
3 through 10. [Doc. No. 13.]. (The Court refers to Fung and Isohunt,
4 Inc. collectively as "Defendants.")

5 Plaintiffs now bring this Motion for Summary Judgment [Doc. No.
6 249] on the grounds that Defendants' users have infringed their
7 copyrights and are liable under theories of inducement, contributory
8 infringement, and vicarious infringement. The Court requested
9 Supplemental Briefing in an Order dated April 3, 2008. [Doc. No. 342.]
10 The Court requested further Supplemental Briefing and augmentation of
11 the record in an Order dated August 25, 2009. [Doc. No. 358.]

12 The material facts supporting Plaintiffs' claims are almost wholly
13 un rebutted. Generally, Defendants' rest their case on legal arguments
14 and meritless evidentiary objections, and offer little of their own
15 evidence that directly addressed Plaintiffs' factual assertions.
16 Accordingly, summary judgment is appropriate in the present case.
17 Having considered the moving papers, as well as arguments presented at
18 hearing and in supplemental briefing, the Court Grants Plaintiffs'
19 Motion for Summary Judgment on Liability.

20 21 **II. FACTUAL BACKGROUND**

22 23 **A. The Torrent Structure**

24 Plaintiffs own or control a large quantity of copyrights within
25 the entertainment and popular media fields. (Plaintiffs' Statement of
26 Undisputed Facts ("Pls.' SUF"), ¶ 1). Defendant Fung maintains and
27 operates a number of websites, including www.isohunt.com,
28

1 www.torrentbox.com, www.podtropolis.com, and www.ed2k-it.com
2 (collectively "Fung sites" or "Defendants' sites"), that allow users to
3 download files to their computers.

4 Plaintiffs maintain that Fung and his websites facilitate their
5 users' infringement of copyrighted files. Specifically, Plaintiffs
6 assert that, through his operation and promotion of the websites, Fung
7 allows users to download infringing copies of popular movies,
8 television shows, sound recordings, software programs, video games, and
9 other copyrighted content free of charge. Users of the Fung sites have
10 downloaded works that are copyrighted by Plaintiffs; these downloads
11 have taken place without authorization from Plaintiffs. (Pls.' SUF, ¶¶
12 2-3.)

13 The Fung sites are an evolutionary modification of traditional
14 "peer-to-peer" sharing sites such as Napster and Grokster. A peer-to-
15 peer service provides a method for users of a network to exchange files
16 quickly and easily between the individuals on the network - other
17 "peers". See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster,
18 Ltd, 545 U.S. 913, 919 (2005). (See also Horowitz² Decl., at ¶ 12.)

19 ² Ellis Horowitz is a Professor of Computer Science and Electrical
20 Engineering at the University of Southern California. Mr. Horowitz
21 has served as a tenured professor since 1983 and his relevant
22 research has been in the field of software development. (Horowitz
23 Decl., at ¶¶ 3, 5.)

24 On summary judgment, expert opinions are admissible under the
25 general requirements of Fed. R. Evid. 702, which requires that the
26 testimony be based on sufficient facts and be the product of reliable
27 principles and methods, and that the witness has applied the
28 principles and methods reliably to the facts of the case. On summary
judgment, expert testimony is also subject to Fed. R. Civ. P.
56(e)(1), which requires a showing [1] that "the affiant is competent
to give an expert opinion and [2] the factual basis for the opinion
is stated in the affidavit, even though the underlying factual
details and reasoning upon which the opinion is based are not."
Bulthuis v. Rexall Corp., 789 F.2d 1315, 1318 (9th Cir. 1985).

[cont'd on next page]

1 The content of the files shared therefore resides on the computers of
 2 individual users rather than on central servers. (Horowitz Decl., at ¶
 3 12.)

4 Through use of the Fung sites, which are commonly known as
 5 "BitTorrent" or "torrent" sites, users download content directly from
 6 the computers of other users and not directly from the servers of the
 7 Defendants, thus operating as a sharing service of the peer-to-peer
 8 variety. (See Horowitz Decl., at ¶ 16.) In a BitTorrent network,
 9 however, the download process is unique from that of previous systems
 10 such as Napster and Grokster.³ Rather than downloading a file from an

11 [cont'd from prev. page]

12 Here, Horowitz's testimony is admissible on summary judgment.
 13 See also Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124,
 130-31, 133, 150, 152 (S.D.N.Y. 2009) (relying on Horowitz's
 14 testimony).

15 Further, the Court notes that both parties' experts (Dr.
 16 Horowitz and Dr. Waterman for Plaintiffs, and Dr. Gribble for
 17 Defendants) are generally unrebutted. (See also footnotes 7 and 13,
 18 *infra*, for a discussion of the other experts' qualifications.)

19 Generally, the Court relies on the experts with respect to three
 20 matters: first, the technological structure of Defendants' websites,
 21 which is agreed-upon in all material respects by Dr. Gribble (for
 22 Defendants) and Dr. Horowitz (for Plaintiffs); second, the statistics
 23 regarding Defendants' users' downloading activities, which is set
 24 forth by Dr. Waterman (for Plaintiffs) and wholly unaddressed by
 25 Defendants' evidence; and third, the dispute over whether or not
 26 Defendants were technologically capable of filtering copyright-
 27 infringing materials from their websites, upon which Dr. Gribble and
 28 Dr. Horowitz disagree (and is discussed in greater detail *infra*, Part
 IV.B.4).

Accordingly, the experts' declarations set forth admissible
 facts. Where unrebutted, these facts allow summary judgment in favor
 of the party proffering the expert testimony on that particular
 issue. Where the experts' disagreement raises a genuine dispute, the
 Court will address the dispute accordingly.

³Napster involved a peer-to-peer network with a central "search index"
 that served as Napster's collective directory for the files available
 on the server at any given time. In order to download the files from
 another user in the Napster network, the individual would search the
 Napster server for the desired file and then select the desired file

[cont'd on next page]

1 individual user, users of a bit-torrent network will select the file
2 that they wish to download, and, at that point, the downloading will
3 begin from a number of host computers that possess the file
4 simultaneously. (See id. at ¶¶ 23-24.) BitTorrent technology relies
5 on a variety of mechanisms in order to accomplish the ultimate
6 downloading of an given file, including: (1) a software application
7 that users download, which is commonly referred to as a "client
8 application"; (2) websites, also known as "torrent sites," which allow
9 users to select "dot-torrent files" that they wish to download; and (3)
10 servers, also known as "trackers," that manage the download process.
11 (Horwitz Decl., at ¶ 17.) The client applications and trackers work
12 together through the use of a "BitTorrent protocol" which standardizes
13 the client-client and client-tracker communications. (Id.) These
14 components essentially work together to allow individuals to visit a
15 torrent site, download files, and keep track of those downloads - as
16 well as discover additional persons to download from - through the use

17 [cont'd from prev. page]

18 from a list of available users in the network. Similar to other
19 peer-to-peer networks, the actual files shared never passed through
20 or resided on the Napster servers. See A&M Records, Inc. v. Napster,
21 Inc., 239 F.3d 1004, 1011-1013 (9th Cir. 2001).

22 In contrast, the technology in the Grokster and Kazaa networks
23 provided a distinct form of the peer-to-peer network. Unlike
24 Napster, there was no central indexing of available files. Instead,
25 an individual scanning through the Grokster software would enter a
26 search term and the software itself, through use of a supernode - or
27 indexing computer - would contact other computers seeking matching
28 files. When a result was found matching the query, the information
regarding the results (the IP address and other information) would be
sent to the requesting computer. The searching user would then
download directly from the relevant computer and the file would be
placed in the designated folder of the requesting computer. See
Grokster, 545 U.S. at 921. In a variation of this network, known as
Gnutella, the process is similar but involves no supernodes.
Instead, the peer computers communicate directly with each other
through the network and requests go directly to other connected
users. See id. at 922.

1 of trackers. In such a system the downloading of the desired content
2 is occurring from multiple source points at the same time and allowing
3 larger downloads to move more expeditiously. During this simultaneous
4 downloading process users form what is known as a "swarm," which allows
5 for quick exchange of the downloading material.⁴

6 Accordingly, in order to download files from others in a
7 BitTorrent network, users must engage in a number of steps. First,
8 users must install a BitTorrent client application. (Horowitz Decl., ¶
9 18.) Standing alone, a BitTorrent client application does not possess
10 the ability to search other computers for files. Instead, as part of
11 the second step, users must visit a torrent site for the purpose of
12 locating dot-torrent files containing the content that they wish to
13 download. (Id. at ¶ 19.)⁵ These torrent sites maintain indexes of
14 available torrent files for download that users may search, or, in the
15 alternative, users may upload torrent files to share with others
16 through the torrent site. (Id.) These torrent files are referred to
17 as "dot-torrent" files in reference to their file extension name.⁶ The
18 dot-torrent files do not contain the actual content item searched for;

20 ⁴ Plaintiffs acknowledge that one of the Fung sites, www.ed2k-it.com,
21 is based on another form of technology known as "eDonkey." (Mot., at
22 6 n.4.) The Court agrees with Plaintiffs' expert that "the basic
23 elements of eDonkey and BitTorrent technology play similar roles,"
24 and that the minor technical distinctions are not material to the
present dispute. (See Horowitz Decl. ¶¶ 30-34.) Notably, Defendants
do not provide any arguments specifically premised on the difference
in technology of "eDonkey."

25 ⁵ Torrent sites are websites accessible through the use of an Internet
browser. (Horowitz Decl., ¶ 20.)

26 ⁶ Accordingly, the extension of those files searched on a torrent site
27 would be ".torrent" in contrast to prior incarnations of peer-to-peer
28 networks where users would search for a file with an extension such
as ".mp3" or ".doc".

1 rather, the dot-torrent file contains the data used by the BitTorrent
2 client to retrieve the content through a peer-to-peer transfer. (Id.
3 at ¶ 21.) In the third step, once the user clicks on the desired dot-
4 torrent file, the BitTorrent client will locate and download the actual
5 content item. (Id. at ¶ 22.) This is accomplished through the use of
6 trackers that are contained within the dot-torrent file. The dot-
7 torrent file contains "hash" values that are used to identify the
8 various pieces of the content file and the location of those pieces in
9 the network. The BitTorrent client application then simultaneously
10 downloads the pieces of the content file from as many users as are
11 available at the time of the request, and then reassembles the content
12 file on the requesting computer when the download is complete. (Id. at
13 ¶ 23.) Once a user downloads a given content file, he also becomes a
14 source for future requests and downloads. (Id.)

15 The advantage of BitTorrent technology is the cumulative nature of
16 its downloading and economies of scale. As more users download a given
17 file, there are more sources for the file pieces necessary for others.
18 This process, whereby individuals maybe be uploading and/or downloading
19 from many sources at any given time is known as a "swarm." (Id. at ¶
20 24.) This prevents a backlog of users waiting to download from one
21 individual user with the source file.

22 **B. Sites Maintained by Defendant Fung**

23 Defendant Fung operates a number of websites, including
24 www.isohunt.com ("Isohunt"), www.torrentbox.com ("Torrentbox"),
25 www.podtropolis.com ("Podtropolis"), and www.ed2k-it.com ("eDonkey").
26 The structure and manner in which users download files from these sites
27 differs in certain respects. The BitTorrent websites - Isohunt,
28

1 Torrentbox, and Podtropolis - all provide users the ability to search
 2 for and download BitTorrent files. (Horowitz Decl., at ¶ 26.) As
 3 explained by Defendants' expert Steven Gribble,⁷ "the defendants' Web
 4 sites collect, receive, index, and make available descriptions of
 5 content, including so-called 'dot-torrent files,' and they also provide
 6 access to 'open-access' BitTorrent Trackers." (Gribble Decl. ¶ 4A.)

7 Users of BitTorrent websites click on a "download torrent" button
 8 or link on the website that will begin the downloading process
 9 described above. (*Id.* at ¶ 27.) The elements of the downloading
 10 process work together to bring the desired content to the user's
 11 computer without any further actions by the user. (*Id.*) As one of
 12 Plaintiffs' experts explains: "[t]he only purpose of a dot-torrent file
 13 is to enable users to identify, locate, and download a copy of the
 14 actual content item referenced by the dot-torrent file. . . . Once a
 15 user has clicked the 'download' torrent button or link, the . . .
 16 desired content file should begin downloading to the user's computer
 17 without any further action or input from the user." (Horowitz Supp.
 18 Decl., ¶¶ 5-6.)

19 The BitTorrent websites, as set forth in further detail below,
 20 also contain a number of categories from which users can select files
 21 to download, including "Top Searches," "Top 20 Movies," "Top 20 TV
 22 Shows," "Box Office Movies." (SUF ¶¶ 8-12, 47-55.)⁸ For example, the

23 ⁷ Steven Gribble is an Associate Professor of Computer Science and
 24 Engineering at the University of Washington. Dr. Gribble's research
 25 focuses on computer systems and computer security, and has focused in
 26 the past on the operations of peer-to-peer systems. (Gribble Decl. ¶
 27 1.)

28 For the reasons discussed in footnote 2, *supra*, Gribble's
 testimony is admissible on summary judgment.

⁸ The "Box Office Movies" feature, although once available, is no
 [cont'd on next page]

1 Isohunt home page contains a listing of "Top Searches," which provides
 2 a listing of the most commonly searched-for terms by users of the
 3 websites. This category contained code filtering out pornography-
 4 related terms from the "Top Searches" display. (*Id.* at ¶ 59.) The
 5 items found within the "Top Searches" category are all associated with
 6 copyrighted content. (SUF, at ¶ 8.) Much the same holds true for the
 7 "Top 20 Most Downloaded Torrents" on Defendant Fung's Torrentbox site.
 8 (*Id.* at 9.) Another of Defendants' sites, Podtropolis, simply contains
 9 lists of the "Top 20 Movies" and "Top 20 TV Shows," all of which
 10 correspond to copyrighted content. (*Id.* at ¶ 10.) The ed2k-it website
 11 contains files in lists entitled "High Quality DVD Rips" and "TV Show
 12 Releases," all of which correspond to copyrighted content.⁹ (*Id.* at ¶
 13 11.)

14 Plaintiffs note that the meta tags¹⁰ used on Fung's websites often
 15 included the term "warez" as a header for every page.¹¹ Plaintiffs also

16 [cont'd from prev. page]

17 longer an element of the website. (Horowitz Decl., ¶ 39-40; Defs.'
 18 SGI, ¶ 57.) There is no dispute, however, that this category was
 once on the BitTorrent website.

19 ⁹ Defendant Fung attempts to dispute these facts, but not on the
 20 grounds that the factual statements are inaccurate. Instead, he
 21 contends that these elements of the website provide only a small
 22 sample of what is available on the website. Whether or not this is
 23 true, it does not rebut the factual accuracy of the claims that
 24 Plaintiffs set forth. Defendant Fung also asserts that the lists
 created by these categories are user-generated and, therefore, simply
 reflect user demand on the site. This argument ignores the fact that
 Defendants created and operated the websites in a manner that placed
 these "user-generated" categories on the websites.

25 ¹⁰ Meta tags are terms commonly embedded into web pages in order to
 26 allow search engines to more quickly categorize the substance of a
 given webpage.

27 ¹¹ The term "warez" is a term used to refer to pirated content.
 28 See Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 133
 (S.D.N.Y. 2009). (See also SUF, at ¶ 25.)

1 point to certain other elements of the webpage that related to known
2 copyrighted material. Defendants, on the home page of the Isohunt
3 website, asked users to upload dot-torrent files of Box Office Movies
4 and also maintained a list of the top twenty grossing movies in U.S.
5 theaters at the time. (SUF, at ¶¶ 50-51.) These lists served the
6 function of getting users to upload dot-torrent files of the latest
7 blockbuster films and have them posted on the Isohunt website. (Id. at
8 52-54.)¹²

9 Plaintiffs engaged in a randomized statistical analysis of the
10 works available on the Isohunt and Torrentbox sites. According to
11 Plaintiffs' expert Richard Waterman,¹³ approximately 95% of downloads
12 occurring through Defendants' sites are downloads of copyright-
13 infringing content. (See Waterman Decl. ¶¶ 6-7.) Waterman's study of
14 the Torrentbox downloads used actual user downloads from log files that
15 were made available upon discovery requests. Waterman further states
16 that 95.6% of all dot-torrent files downloaded from Torrentbox are for
17 either copyrighted or highly likely copyrighted material. (Id. at ¶
18 31.) In a study of the Isohunt website, Waterman found that
19 approximately 90% of files available and 94% of dot-torrent files
20 downloaded from the site are copyrighted or highly likely copyrighted.
21 (Id. at ¶¶ 24, 28.) Though Defendants raise conclusory boilerplate
22 objections to Waterman's declaration, Defendants fail to call

23 ¹² Plaintiffs acknowledge that, at some point, the "Box Office Movies"
24 feature was discontinued on the website. (SUF, at ¶ 54.)

25 ¹³ Richard Waterman is an Adjunct Associate Professor of Statistics at
26 the University of Pennsylvania's Wharton School of Business.
27 (Waterman Decl. ¶ 1.) Dr. Waterman operates a statistics consultancy
28 and has testified in a similar case involving secondary copyright
infringement. See Arista Records LLC, 633 F. Supp. 2d at 143-44.

For the reasons discussed in footnote 2, *supra*, Waterman's
testimony is admissible on summary judgment.

1 Waterman's factual conclusions into doubt. (See Defs.' Evidentiary
2 Objections, at 10-19.) Despite Defendants' repeated assertions that
3 the evidence is based on "junk science," (id.) Defendants fail to rebut
4 Waterman's statement that he relied on the standard statistical
5 sampling techniques used in his field. (Waterman Decl. ¶ 8 n.1.) It
6 is also noteworthy that numerous courts have relied on such statistical
7 sampling. See Arista Records, 633 F. Supp. 2d at 144-45; MGM Studios,
8 Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 985 (C.D. Cal. 2006); A &
9 M Records, Inc. v. Napster, 114 F. Supp. 2d 896, 902-03 (N.D. Cal.
10 2000), *aff'd*, 239 F.3d 1004 (9th Cir. 2001). To the extent that the
11 evidence suggests an unrealistic level of accuracy, the Court notes
12 that Waterman's data shows that these numbers are accurate to a 95%
13 confidence level, and include margins of error of plus-or-minus 5% or
14 less. (See Waterman Decl. ¶¶ 13, 14, 18, 25, 29, 32, 34.) Further,
15 Plaintiffs provide the specific data upon which Waterman based his
16 categorization of available files as infringing, likely infringing, and
17 non-infringing. (See Pls.' Ex. T, Waterman Depos., at 39, 48; Friedman
18 Decl. ¶¶ 11, 15, 16.) In any event, for the purposes of this case, the
19 precise percentage of infringement is irrelevant: the evidence clearly
20 shows that Defendants' users infringed on a significant scale. It
21 simply does not matter whether 75% (to pick a number) of available
22 materials were copyrighted or 95% of available materials were
23 copyrighted; and even if this distinction *did* matter, Defendants have
24 simply failed to satisfy their summary judgment burden by submitting
25 admissible evidence that raises a triable dispute regarding Plaintiffs'
26 evidence that a substantial percentage of the available files included
27 copyright-infringing or highly likely copyright-infringing content.
28

1 See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S.
2 574, 586-87 (1986) ("When the moving party has carried its burden under
3 Rule 56(c), its opponent must do more than simply show that there is
4 some metaphysical doubt as to the material facts. In the language of
5 the Rule, the nonmoving party must come forward with 'specific facts
6 showing that there is a *genuine issue for trial*.'" (internal citations
7 omitted).

8 C. Fung's Participation in the Websites

9 In addition to the general structure of the pages maintained by
10 Defendants, Defendant Fung has personally made a number of statements
11 regarding the copyrighted nature of the works available on his sites.
12 In one such post on the Isohunt website Defendant Fung responded to a
13 user's post by stating "they accuse us for [sic] thieves, and they r
14 [sic] right. Only we r [sic] 'stealing' from the lechers (them) and not
15 the originators (artists)." (SUF, at ¶ 14.) In an interview Fung
16 stated: "Morally, I'm a Christian. 'Thou shalt not steal.' But to me,
17 even copyright infringement when it occurs may not necessarily be
18 stealing." (Id. at ¶ 15.) In another post Fung stated: "We completely
19 oppose RIAA & Co. so do not be alarmed by our indexing activities. . .
20 ." (Id. at ¶ 18.) In another interview Fung also stated that users
21 were attracted to his website by the availability of a blockbuster film
22 of the time, *The Da Vinci Code*. (Id. at ¶ 20.) Fung's other
23 statements included references to aiding individuals in the download
24 of then-popular movie titles such as *Matrix Reloaded* and *Lord of the*
25 *Rings: Return of the King*, pointing users to links where they could
26 download copies of these movies through the torrent sites. (Id. at ¶¶
27 27-29.) Other statements made on the website encouraged or made
28

1 available the downloading of illegal content by users who were browsing
2 the discussion forums on Fung's websites. (Id. at ¶¶ 33-46.)

3 Plaintiffs also provide details relating to the assistance that
4 Fung would give website users in downloading copyrighted material
5 within the forum discussions of the various websites. In one such
6 instance, in response to a user query on how to make a DVD from a
7 downloaded copy of the film *Pirates of the Caribbean*, Fung provided a
8 link to a website that would allow the individual to burn a DVD of the
9 downloaded copy. (SUF, at 68.) Fung provided users with assistance on
10 a number of occasions regarding how they could go about playing or
11 extracting the copyrighted films that they downloaded from the
12 Defendants' websites. (Id. at 70, 72.) Fung also provided assistance
13 to a user who was searching for episodes of the television series *Star*
14 *Trek: Enterprise*; Fung provided links to search possible search queries
15 that would turn up the work. (Id. at 71.) Fung also provided
16 technical advice regarding the use of "trackers" in response to emails
17 containing dot-torrent files connected with copyrighted television
18 programs, such as the NBC series *The Office*. (Id. at 79.)

19 20 **III. SUMMARY JUDGMENT STANDARD**

21 22 **A. Rule 56 Standard**

23 Rule 56(c) requires summary judgment for the moving party when the
24 evidence, viewed in the light most favorable to the nonmoving party,
25 shows that there is no genuine issue as to any material fact, and that
26 the moving party is entitled to judgment as a matter of law. See Fed.

27 ///

1 R. Civ. P. 56(c); Tarin v. County of Los Angeles, 123 F.3d 1259, 1263
2 (9th Cir. 1997).

3 The moving party bears the initial burden of establishing the
4 absence of a genuine issue of material fact. See Celotex Corp v.
5 Catrete, 477 U.S. 317, 323-24 (1986). When a party moves for summary
6 judgment under Rule 56(c), that party bears the burden of affirmatively
7 establishing all elements of its legal claim. See Southern Cal. Gas
8 Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003) (per curiam)
9 (adopting District Court order as its own); see also Fontenot v. Upjohn
10 Co., 780 F.2d 1190, 1194 (5th Cir. 1986) ("[I]f the movant bears the
11 burden of proof on an issue, either because he is the plaintiff or as a
12 defendant he is asserting an affirmative defense, he must establish
13 beyond peradventure all of the essential elements of the claim or
14 defense to warrant judgment in his favor.") (emphasis in original).

15 Once the moving party has met its initial burden, Rule 56(e)
16 requires the nonmoving party to go beyond the pleadings and identify
17 specific facts that show a genuine issue for trial. See Celotex, 477
18 U.S. at 323-34; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
19 (1986). A scintilla of evidence or evidence that is merely colorable
20 or not significantly probative does not present a genuine issue of
21 material fact. Addisu v. Fred Meyer, 198 F.3d 1130, 1134 (9th Cir.
22 2000). Summary judgment is precluded only if there is a genuine
23 dispute "where the evidence is such that a reasonable jury could return
24 a verdict for the nonmoving party" over facts that might affect the
25 outcome of the suit under the governing law. See Anderson, 477 U.S. at
26 248; see also Aprin v. Santa Clara Valley Transp. Agency, 261 F.3d 912,
27 919 (9th Cir. 2001) (the nonmoving party must identify specific
28

1 evidence from which a reasonable jury could return a verdict in its
2 favor).

3 **B. Evidentiary Standards**

4 Under the Local Rules of this Court, the Court may base its
5 judgment on the facts stated in the moving party's "Statement of
6 Uncontroverted Facts and Conclusions of Law," L.R. 56-1, but only to
7 the extent that the facts are "adequately supported by the moving
8 party" -- i.e., with evidence in the record -- and are uncontroverted
9 by evidence submitted or identified by the opposition. L.R. 56-3.

10 "A trial court can only consider admissible evidence in ruling on
11 a motion for summary judgment." Orr v. Bank of Am., 285 F.3d 764, 773
12 (9th Cir. 2002); see also Fed. R. Civ. P. 56(e). Of course, the court
13 need only consider evidentiary objections if the Court actually relies
14 on such evidence. Thus, to the extent that the Court relies on
15 evidence to which a party has properly objected, the Court will address
16 these objections in the course of this Order.

17 18 **IV. ANALYSIS**

19 20 **A. Preliminary Issues Regarding Secondary Liability**

21 **1. Secondary Theories of Liability**

22 Plaintiffs move for summary judgment against defendants on three
23 separate grounds: inducement of copyright infringement, material
24 contribution to copyright infringement, and vicarious copyright
25 infringement. The Court will only address the first theory, because
26 Defendants' inducement liability is overwhelmingly clear. Discussion
27 of Plaintiffs' alternative theories of liability would be unnecessarily
28

1 duplicative with respect to the central question at issue in this
2 Motion: Defendants' secondary liability for its users' copyright
3 infringement.

4 The first two theories (material contribution and inducement) are
5 known collectively as "contributory liability." Perfect 10 v. Visa
6 Int'l Serv. Ass'n, 494 F.3d 788, 795 (9th Cir. 2007) ("One
7 contributorily infringes when he (1) has knowledge of another's
8 infringement and (2) either (a) materially contributes to or (b)
9 induces that infringement."), *cert. denied*, 128 S.Ct. 2871 (2008).
10 Despite the analytical similarities between the inducement and material
11 contribution theories, it is now established in this Circuit that
12 inducement and material contribution are distinct theories of
13 contributory liability through which defendants can be found liable.
14 Id.; see also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518
15 F. Supp. 2d 1197, 1227 (C.D. Cal. 2007) ("Grokster V") ("material
16 contribution and inducement are two doctrinal subsets of the
17 contributory infringement theory of liability."). Generally,
18 inducement requires that the defendant has undertaken purposeful acts
19 aimed at assisting and encouraging others to infringe copyright, see
20 Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, 545 U.S. 913, 936-37
21 (2005) ("Grokster III"); in contrast, material contribution (in the
22 context of "computer system operator[s]") applies if the defendant "has
23 actual knowledge that *specific* infringing material is available using
24 its system, and can take simple measures to prevent further damage to
25 copyrighted works, yet continues to provide access to infringing
26 works." Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172 (9th
27 Cir. 2007) (internal citations and quotations omitted) (emphasis in
28

1 original). The third theory, vicarious liability, is similar to
2 contributory liability but includes some contours that differ from
3 these other theories of liability. A defendant "infringes vicariously
4 by profiting from direct infringement while declining to exercise a
5 right to stop or limit it." Grokster III, 545 U.S. at 930.

6 2. Actual Infringement by Defendants' Users

7 With respect to all three of Plaintiffs' theories of liability,
8 Plaintiffs must first demonstrate that there has been direct
9 infringement of their copyrights by third parties. Amazon, 508 F.3d at
10 1169 (citing A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013
11 n.2 (9th Cir. 2001)) ("Secondary liability for copyright infringement
12 does not exist in the absence of direct infringement by a third
13 party."). Plaintiffs have provided direct evidence of copyright
14 infringement by Defendants' users, and Defendants have not introduced
15 any evidence creating a triable issue of fact on this issue.

16 To establish copyright infringement, Plaintiffs must show that
17 they own the copyrights that have been infringed, and that third
18 parties have made unauthorized copies, downloads, or transfers of this
19 material. 17 U.S.C. § 106(1), (3). Implicit in 17 U.S.C. § 106 is a
20 further requirement at issue in the present case: that the infringement
21 of Plaintiffs' copyrights occur inside the United States. The Ninth
22 Circuit has determined that "United States copyright laws do not reach
23 acts of infringement that take place entirely abroad." Subafilms, Ltd.
24 v. MGM-Pathe Comm'ns Co., 24 F.3d 1088, 1098 (9th Cir. 1994) (en banc),
25 *cert. denied sub nom. Subafilms, Ltd. v. United Artists Corp.*, 513 U.S.
26 1001 (1994). As a later panel of that court wrote, "in order for U.S.
27 copyright law to apply, at least one alleged infringement must be
28

1 completed entirely within the United States.” Allarcom Pay Television,
2 Ltd. v. Gen’l Instrument Corp., 69 F.3d 381, 387 (9th Cir. 1995).

3 In the context of secondary liability, an actor may be liable for
4 “activity undertaken abroad that knowingly induces infringement within
5 the United States.” 3 Nimmer on Copyright, § 12.04(D)(2) (citing
6 Armstrong v. Virgin Records, Ltd., 91 F. Supp. 2d 628, 634 (S.D.N.Y.
7 2000); Blue Ribbon Pet Prods., Inc. v. Rolf C. Hagen (USA) Corp., 66 F.
8 Supp. 2d 454, 462-64 (E.D.N.Y. 1999)). Once Plaintiffs have
9 established that an act of infringement has taken place within the
10 United States, Defendants may be held liable for their conduct that
11 constitutes inducement, material contribution, or vicarious
12 infringement, even if Defendants’ conduct took place abroad. Id.¹⁴

13 Here, there is not a genuine factual dispute over whether the
14 users of Fung’s websites infringed Plaintiffs’ copyrights. It is
15 undisputed that Plaintiffs “own or control the copyrights, or exclusive
16 rights under copyright” for the works at issue in this case. (SUF, ¶
17 1.) It is also undisputed that Plaintiffs have not authorized the
18 distribution of their copyrighted works by Defendants or Defendants’
19 users. (SUF, ¶ 3.)

20 The only purported dispute with respect to third parties’ direct
21 infringement is whether Plaintiffs have provided any evidence that
22 users of Fung’s sites have violated 17 U.S.C. § 106(1) and § 106(3) by
23 reproducing and distributing Plaintiffs’ copyrighted works. (SUF, ¶ 2;
24 SGI, ¶ 2.)

25 Defendants argue that Plaintiffs must provide evidence that both

26 ¹⁴ The Court notes that Defendants have operated computer servers in
27 Maryland and Texas. Columbia Pictures Inds., Inc. v. Fung, 447 F.
28 Supp. 2d 306, 310 (S.D.N.Y. 2006) (order granting motion for change
of venue and transferring case to this Court).

1 the transferor and the transferee are located in the United States.
2 (See Defs.' Supp. Opp. at 3-4.) However, United States copyright law
3 does not require that both parties be located in the United States.
4 Rather, the acts of uploading and downloading are each independent
5 grounds of copyright infringement liability. Uploading a copyrighted
6 content file to other users (regardless of where those users are
7 located) violates the copyright holder's § 106(3) distribution right.
8 Downloading a copyrighted content file from other users (regardless of
9 where those users are located) violates the copyright holder's § 106(1)
10 reproduction right. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004,
11 1014 (9th Cir. 2001). Accordingly, Plaintiffs need only show that
12 United States users either uploaded or downloaded copyrighted works;
13 Plaintiffs need not show that a particular file was both uploaded and
14 downloaded entirely within the United States.

15 Defendants also assert that Plaintiffs rely on inadmissible
16 hearsay and inadmissible statistical data. (SGI, ¶ 3.) Contrary to
17 Defendants' assertions, Plaintiffs' expert evidence is admissible; and,
18 in any event, Plaintiffs provide direct evidence of specific acts of
19 infringement. There is abundant evidence of copyright infringement
20 using Defendants' websites.

21 Plaintiffs' expert Richard Waterman conducted a study showing that
22 more than 95% of files available through Defendants' websites are
23 copyrighted or are highly likely to be copyrighted. (SUF, ¶¶ 5-6.)
24 Even taking into account Waterman's margins of error (5% or less), such
25 overwhelming statistical evidence is sufficient to establish that
26 Defendants' websites allowed third party users to access copyrighted
27 material, and that users of Defendants' websites made copyrighted
28

1 material available for others to access.¹⁵

2 Plaintiffs' broad statistical evidence is corroborated by evidence
3 of specific instances of downloads and transfers of copyrighted works
4 through Defendants' websites. In his deposition, Defendant Fung
5 admitted to using the Isohunt website to download copyrighted broadcast
6 television shows such as *The Simpsons* and *Lost*. (SUF, ¶¶ 2, 57, 122.)
7 Similarly, Fung admitted to downloading the copyrighted film *The Lord*
8 *of the Rings: The Fellowship of the Ring*. (SUF, ¶ 58.) Declarant
9 Chris Masciarelli stated that he used Defendants' website isohunt.com
10 to download a copyrighted work entitled *Family Guy Presents Stewie*
11 *Griffin: The Untold Story*. (SUF, ¶ 2; Masciarelli Decl.).

12 Although Defendants argue that there is no clear evidence that any
13 infringement took place in the United States, Plaintiffs have presented
14 admissible evidence of domestic infringement involving a copyright
15 owned by each of Plaintiffs. Plaintiffs provide evidence based on
16 internet protocol ("IP") address¹⁶ data and usage-summary data produced

17 ¹⁵As noted *supra*, this expert evidence is admissible and unrebutted.
18 Notably, other courts dealing with similar issues have relied on
19 similar studies based on statistical samples of the relevant products
20 or services. These courts have approved the basic statistical
21 methodologies employed by Plaintiffs' expert. See, e.g., Arista
22 Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 145 (S.D.N.Y.
2009); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F.
Supp. 2d 966, 985 (C.D. Cal. 2006); A & M Records, Inc v. Napster,
Inc., 114 F.Supp.2d 896, 902-03 & n.6 (N.D. Cal. 2000), *aff'd in part*
and rev'd on other grounds, 239 F.3d 1004 (9th Cir. 2001).

23 ¹⁶ "An IP address is a standard way of identifying a computer that
24 is connected to the Internet. With an IP address, a party could
25 identify the Internet Service Provider providing internet service to
26 the user of the computer corresponding to such IP address." (June 8,
2007 Order Granting in Part and Denying in Part Plaintiffs' Motion to
Require Defendants to Preserve and Produce Server Log Data and for
Evidentiary Sanctions) (Magistrate Judge) (citing United States v.
27 Heckenkamp, 482 F.3d 1142, 1144 (9th Cir. 2007)) [docket no. 146].)

28 Defendants' own expert has opined that IP-based location

[cont'd on next page]

1 by Defendants themselves. Plaintiffs have also have used IP-address
 2 data to locate Defendants' users and show that particular infringing
 3 downloads took place in the United States. (Pozza Supp. Decl. ¶¶ 3, 4,
 4 Ex. 5; see also Masciarelli Decl.) Further, in an examination of
 5 roughly 400 downloads (the only available evidence containing users' IP
 6 addresses), approximately 50% of the actual downloads using Defendants
 7 websites were made from the United States. (Waterman Supp. Decl. ¶ 7;
 8 Horowitz Supp. Decl. ¶ 21 & Ex. 1.)¹⁷

9 Plaintiffs have also provided evidence that, contrary to
 10 Defendants' wholly unsupported assertions, dot-torrent files downloaded
 11 from Defendants' sites correspond to and automatically cause the
 12 downloading of Plaintiffs' copyrighted content.¹⁸ (Bedser Supp. Decl.,
 13 ¶ 4; Ishikawa Supp. Decl., Ex. 2; Grodsky Supp. Decl., Ex. 2; Sehested
 14

15 [cont'd from prev. page]

16 analysis is highly accurate. (Gribble Decl. ¶ 30.) Plaintiffs'
 expert agrees. (Horowitz Supp. Decl. ¶ 11.)

17 ¹⁷Defendants' own usage summaries show that approximately 25% of
 18 Defendants' users are located in the United States. (Horowitz Supp.
 19 Decl. ¶ 24, Ex. 5.) This 25% figure is further supported by evidence
 20 from Alexa and Quantcast, which are third-party sources of internet
 21 traffic information. (See Horowitz Supp. Decl. ¶ 24 & Ex. 6.)
 Defendants do not object to the exhibits which contain this 25%
 figure. (See Defs.' Objections to Horowitz Supp. Decl., ¶ 14; Defs.'
 Objections to Waterman Supp. Decl., ¶ 3.)

22 ¹⁸The fact that the dot-torrent files automatically cause content
 23 files to be downloaded and assembled (see also supra Part II.A)
 24 rebuts Defendants' assertions that users' act of downloading dot-
 25 torrent files does not constitute actual copyright infringement. It
 26 may be true that the act of downloading a dot-torrent file is not
 27 itself a copyright-infringing action; but once that dot-torrent file
 28 triggers the process of downloading a content file, copyright
 infringement has taken place. Because dot-torrent files
 automatically trigger this content-downloading process, it is clear
 that dot-torrent files and content files are, for all practical
 purposes, synonymous. To conclude otherwise would be to elevate form
 over substance.

1 Supp. Decl., Ex. 2). Finally, Plaintiffs have linked the United
2 States-based downloads (as identified by Plaintiffs' experts) with
3 copyrighted works owned by each of the individual Plaintiffs.
4 (Whitehead Supp. Decl., Ex. 1; Clinton Supp. Decl. Ex. 1; Sunderland
5 Supp. Decl., Ex. 1; Kang Supp. Decl., Ex. 1; Cherkoori Supp. Decl., Ex.
6 1; Kaplan Supp. Decl., Ex. 1.)

7 Accordingly, Plaintiffs' evidence conclusively establishes that
8 individuals located in the United States have used Fung's sites to
9 download copies of copyrighted works. Defendants fail to introduce any
10 evidence that raises a triable issue regarding the fact that
11 Plaintiffs' copyrights have been infringed by third parties.

12 **B. Inducement of Infringement**

13 Plaintiffs first seek summary judgment under the "inducement"
14 theory articulated in the Supreme Court case Metro-Goldwyn-Mayer
15 Studios, Inc. v. Grokster, 545 U.S. 913 (2005) ("Grokster III"). In an
16 opinion by Justice Souter, the Supreme Court held that "one who
17 distributes a device with the object of promoting its use to infringe
18 copyright, as shown by clear expression or other affirmative steps
19 taken to foster infringement, is liable for the resulting acts of
20 infringement by third parties." Grokster III, 545 U.S. at 936-37. The
21 Supreme Court further explained,

22 [M]ere knowledge of infringing potential or of actual infringing
23 uses would not be enough here to subject a distributor [of the
24 device] to liability. Nor would ordinary acts incident to product
25 distribution, such as offering customers technical support or
26 product updates, support liability in themselves. The inducement
27 rule, instead, premises liability on purposeful, culpable
28

1 expression and conduct, and thus does nothing to compromise
2 legitimate commerce or discourage innovation having a lawful
3 promise.

4 Id. at 937 (emphasis added). Importantly, liability may attach even if
5 the defendant does not induce specific acts of infringement. Id. at
6 940 n.13 (emphasis added).¹⁹ Instead, the court may "infer[] a patently
7 illegal objective from statements and actions showing what [the
8 defendant's] objective was." Id. at 941.

9 An unlawful objective to promote infringement can be shown by a
10 variety of means. "The classic instance of inducement is by
11 advertisement or solicitation that broadcasts a message designed to
12 stimulate others to commit violations." Id. at 937; see also Visa
13 Int'l., 494 F.3d at 800. For example, in Grokster III, the defendants
14 "respond[ed] affirmatively to requests for help in locating and playing
15 copyrighted materials." 545 U.S. at 938.

16 However, showing that the defendant sent out a specific message is
17 "not [the] exclusive way of" demonstrating inducement. Grokster III,
18 545 U.S. at 938. The Supreme Court in Grokster III highlighted three

19 ¹⁹ In its opinion, the Supreme Court noted the defendant's argument
20 that a court must make a determination of their liability on the
21 basis of specific past acts that encouraged inducement. Defendants
22 here offer a similar argument. The Supreme Court, however, rejected
23 such a proposition, stating:

24 This contention misapprehends the basis for their potential
25 liability. It is not only that encouraging a particular
26 consumer to infringe a copyright can give rise to secondary
27 liability for the infringement that results. Inducement
28 liability goes beyond that, and the distribution of a product
can itself give rise to liability where evidence shows that the
distributor intended and encouraged the product to be used to
infringe. In such a case, the culpable act is not merely the
encouragement of infringement but also the distribution of the
tool intended for infringing use.

Grokster III, 545 U.S. at 940 n.13 (internal citations omitted,
emphasis added).

1 facts from which a reasonable factfinder could infer intent to foster
2 infringement in that case. First, the Court noted that the defendant's
3 owns communications and advertising designs had expressed an intent to
4 target Napster users, a community well-known for copyright
5 infringement. Although it was not known whether some of the
6 advertising designs were actually communicated to the public, "whether
7 the messages were communicated is not to the point on this record."
8 Id. at 938. "The function of the message in the theory of inducement
9 is to prove by a defendant's own statements that his unlawful purpose
10 disqualifies him from claiming protection." Id. Second, the Court
11 found it probative that defendants did not attempt to develop filtering
12 tools or other means of diminishing the use of its products for
13 infringement. Taken alone, the failure to develop a filter would be
14 insufficient to support liability; but viewed in conjunction with other
15 evidence it underscored the defendants' unlawful objective. Id. at 939
16 n.12. Third, the Court considered the fact that the defendants'
17 business model depended on high-volume use of its software, which was
18 overwhelmingly infringing, as circumstantial evidence of intent to
19 induce infringement. Id. at 939-40. Again, this evidence would not
20 alone justify the imposition of liability, but it supported an
21 inference of unlawful intent when viewed in context with other evidence
22 in the record. Id. Based on these elements of the factual record, the
23 Court held that the defendants' "unlawful objective is unmistakable."
24 Id. at 940.

25 On remand from the Supreme Court, the District Court took into
26 account other factors in finding the defendants' intent to induce
27 infringement, including the "the staggering scale of infringement"
28

1 occurring through use of defendants' products, technical assistance
2 provided by the defendants to users for the playback of copyrighted
3 content, and affirmative steps taken by defendants to ensure that their
4 products would be capable of infringing use. Metro-Goldwyn-Mayer
5 Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 985-92 (C.D. Cal.
6 2006) ("Grokster IV").

7 Upon review of all the evidence in the present case, the Court
8 determines that evidence of Defendants' intent to induce infringement
9 is overwhelming and beyond reasonable dispute.

10 **1. Defendants' message to users**

11 Plaintiffs present a variety of undisputed evidence that
12 Defendants disseminated a message "designed to stimulate others" to
13 commit infringements. Grokster III, 545 U.S. at 916. The clearest
14 instance of Defendants' solicitation of infringing activity is the "Box
15 Office Movies" feature of Defendants' Isohunt site. As Defendant Fung
16 admitted in his deposition, this feature essentially involved
17 Defendants' periodic posting of a list of the top 20 highest-grossing
18 films then playing in United States, which linked to detailed web-pages
19 concerning each film.²⁰ Each of these pages contained "upload torrent"
20 links allowing users to upload dot-torrent files for the films. Though
21 Defendants eventually discontinued this feature, they did not remove
22 pages that had already been created. (SUF, ¶¶ 50-55.) By implementing
23 this feature, therefore, Defendants engaged in direct solicitation of
24 infringing activity. Defendant Fung, in his subsequent declaration
25 filed with Defendants' Opposition, denies that this feature was

26 ²⁰ It goes without saying that the highest-grossing films currently in
27 theaters are copyrighted works. See Grokster V, 454 F. Supp. 2d at
28 992 ("it is common knowledge that most popular music and movies are
copyrighted"). Defendants have not rebutted this obvious inference.

1 intended to induce copyright infringement and asserts that the web-
2 pages "did not lead anywhere." (Fung Decl., ¶ 58.) However, "actions
3 speak louder than words," Arista Records, 633 F. Supp. 2d at 153 n.20,
4 and Fung cannot dispute the objective historical fact that the websites
5 included a "Box Office Movies" feature at one time. This feature
6 evidences Defendants' intent to encourage their users' infringement.

7 In addition to the "Box Office Movies" feature, Plaintiffs present
8 other evidence that Defendants disseminated messages designed to
9 stimulate inducement. In particular, Plaintiffs demonstrate that,
10 Defendants' websites present available torrent files (the vast majority
11 of which contain infringing content) in browseable categories and
12 provide further information about the works contained in the files.
13 (SUF, ¶¶ 47-48.) Defendants also generate lists of the most popular
14 files in categories like "Top 20 Movies." (SUF, ¶ 49.) Defendants do
15 not dispute the presence of such information on their web-site, but
16 instead merely assert that the lists' content originates from users or
17 from automated processes that simply reflect user activity. (SGI ¶ 11;
18 Fung. Decl., ¶¶ 54-55, 57). Defendants' assertions ignore the material
19 fact that Defendants designed the websites and included a feature that
20 collects users' most commonly searched-for titles. The fact that these
21 lists almost exclusively contained copyrighted works (see SUF ¶¶ 8-13)
22 and that Defendants never removed these lists is probative of
23 Defendants' knowledge of ongoing infringement and failure to stop this
24 infringement.

25 Plaintiffs also provide evidence of what the Supreme Court has
26 termed the "classic instance of inducement" – a statement that
27 "broadcasts a message designed to stimulate others to commit
28

1 violations." Grokster III, 545 U.S. at 938. Defendant Fung made
2 statements on the Isohunt website encouraging or assisting
3 infringement. He posted on his website a message telling the website's
4 users that they should "try Peer Guardian," a software application that
5 can be used to frustrate copyright enforcement against file sharers.
6 (SUF, ¶ 94.) Accord Grokster III, 545 U.S. at 937-38. Fung also
7 provided a link to a torrent file for the recent film *Lord of the*
8 *Rings: Return of the King* on the Isohunt site and stated, "if you are
9 curious, download this." (SUF, ¶ 29.) Additionally, Fung created a
10 promotional page inviting users to upload torrent files for *Matrix*
11 *Reloaded*, another recent film. (SUF, ¶ 28.)

12 It is also undisputed that certain key terms known to the pirating
13 community, such as "warez," were meta tags embedded in the websites for
14 reference by search engines. Additionally, the Fung websites have
15 honorary ranking systems for those who posted a certain number of forum
16 users messages; ranks include titles such as "I pir4te, therefore I am"
17 and "All Day I Dream About W4rez." (SUF, ¶ 22.) In other words, the
18 websites bestowed honors by identifying users as copyright infringers.
19 This is strong circumstantial evidence that Defendants promoted their
20 users' infringing activities by consciously fostering a community that
21 encouraged - indeed, celebrated - copyright infringement.

22 Perhaps most tellingly, Fung has personally engaged in a broad
23 campaign of encouraging copyright infringement. In a statement on the
24 Isohunt website, Fung stated: "they accuse us for [sic] thieves, and
25 they r [sic] right. Only we r [sic] 'stealing' from the lechers (them)
26 and not the originators (artists)." (SUF, at ¶ 14.) In an interview
27 with another website Fung stated: "Morally, I'm a Christian. 'Thou
28

1 shalt not steal.' But to me, even copyright infringement when it
2 occurs may not necessarily be stealing." (*Id.* at ¶ 15.) Fung's
3 statements provide further evidence that he has encouraged third
4 parties to engage in copyright infringement. These statements also
5 provide probative evidence regarding Fung's intent in creating the
6 Defendant websites to aid others' infringement.

7 **2. Defendants' assistance to users engaging in infringement**

8 There is also evidence that Defendants directly assisted users in
9 engaging in infringement. As in *Grokster III*, Defendants in the
10 present case have "respond[ed] affirmatively to requests for help in
11 locating and playing copyrighted materials." 545 U.S. at 938.

12 Defendant Fung personally posted messages in the Isohunt
13 discussion forums in which he provided technical assistance to users
14 seeking copyrighted works. Specifically, in response to an Isohunt
15 user who posted a message stating he did not know how to watch a file
16 containing *Lord of the Rings: Return of the King* which he had recently
17 downloaded, Defendant Fung provided directions on how to extract and
18 play the video file. (SUF, ¶ 69.) The record is replete with such
19 instances of technical assistance provided to users by Defendant Fung
20 through the forum. (*See, e.g.*, SUF, ¶ 70 (Fung provided technical
21 assistant to users who downloaded the film *Kill Bill*); SUF, ¶ 71 (Fung
22 provided assistance to user searching for *Star Trek: Enterprise*
23 episodes by giving search tips); SUF, ¶ 79 (Fung explained how to
24 attach a tracker URL to a dot-torrent file sent to him by an Isohunt
25 user, and recommended the user use the tracker at torrentbox.com).)

26 In addition to Fung's personal statements, statements by the
27 "moderators" of Fung's websites provide further evidence of the
28

1 Defendant websites' active inducement of infringing activities. There
 2 are numerous individuals who are known as "moderators" or "admins."
 3 The term "moderators" refers to "individuals whose job it is to look
 4 after the running of the forums from day to day." (SGI, ¶ 41.)
 5 Moderators can edit, delete, and reorganize postings in the forums.
 6 (SGI, ¶ 42.) Some moderators, referred to as "admins," also have the
 7 ability to ban selected abusive users and remove user-posted dot-
 8 torrent files. (Id.) There is no substantive dispute by Defendants
 9 regarding their relationship to these individuals. Defendants assign
 10 this status and give these individuals authority to moderate the forums
 11 and user discussions. These individuals were under the control of
 12 Defendants and assigned duties related to the administration of the web
 13 forums. Therefore, there is an agency relationship between these
 14 individual moderators (or "admins") and Defendants.²¹

15
 16 ²¹ An agency relationship is created "by a principal's manifestation
 17 to an agent that, as reasonably understood by the agent, expresses
 18 the principal's assent that the agent take action on the principal's
 19 behalf." Restatement (Third) of Agency, § 3.01 (2006); see Community
for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 & n.31 (1989)
 (looking to Restatement to determine federal common law of agency
 under Copyright Act).

20 Under common law principles of agency, the "moderators" were the
 21 Defendants' agents with respect to their interactions with the online
 22 message boards and forums. Even though there is no evidence that the
 23 moderators were specifically authorized to post messages in these
 24 forums, the websites' act of designating them as "moderators" and
 providing them with specific forum-related powers leads a "third
 party reasonably [to] believe[] the actor has authority to act on
 behalf of the principal and that belief is traceable to the
 principal's manifestations." Restatement (Third) of Agency, § 2.03
 (2006) (describing "apparent authority").

25 There is no genuine dispute that agency is established here, as
 26 Defendants introduce no evidence that would provide a triable issue
 27 to rebut Plaintiffs' prima facie showing of agency. Defendants
 28 merely assert that Plaintiffs evidence "suggests triable issues of
 fact." (Opp. at 19 n.10.) Unsupported assertions do not give rise
 to a genuine dispute of fact. Plaintiffs' evidence, unless refuted,

[cont'd on next page]

1 The Defendant websites are full of statements by moderators who
2 assisted users seeking to download files or provided links to other
3 websites containing the requested items. In a post on the Isohunt
4 forums, moderator "Estranged" provided instructions regarding DVD
5 ripping and conversion. (SUF, ¶ 45.) In a post on Torrentbox,
6 moderator "Skull and Bones" referred a user to 353 dot-torrent files
7 including *King Kong* and *Silent Hill*, which were "very good quality" and
8 stated that "[m]ost of your films are here at Torrentbox or search on
9 isohunt.com." (SUF, ¶ 46.) In a post on the website Podtropolis,
10 moderator "NewAgePirate" responded to a user who posted a list with
11 films such as *The Godfather*, *Clockwork Orange*, and *One Flew Over the*
12 *Cuckoo's Nest*, with a post that stated "Great list by the way man.
13 Great to have you here." (SUF, ¶ 35.) All of these statements
14 demonstrate that there was an active role played by the administrators
15 of the websites within the forum, encouraging and providing technical
16 assistance for users seeking to engage in infringing activities.

17 All of these statements demonstrate the assistance Defendant Fung
18 and the corporate Defendant provided to the websites' users in
19 infringing Plaintiffs' copyrights. Such actions demonstrate that
20 Defendants did not maintain a hands-off approach to the operation of
21 the sites. Instead, various of Defendants' representatives gave
22 technical assistance and aid in the organized forum discussions that
23 furthered the third parties' infringement using the sites.

24 Defendant Fung argues that the First Amendment protects any
25 statements made by him or the agents. Such an argument, however, is
26

27 [cont'd from prev. page]
28 compels a finding of an agency relationship. Plaintiffs' evidence
has not been refuted, and agency is accordingly established.

1 unavailing. The central premise of the Supreme Court's decision in
 2 Grokster III is that a defendant's statements can be probative of an
 3 intent to induce infringement. Explicit statements by defendants will
 4 often form the most substantial form of proof in inducement or material
 5 contribution cases. See generally Grokster III, 545 U.S. 913; Napster,
 6 239 F.3d 1004. Additionally, the statements themselves are not the
 7 activity prohibited by this doctrine, but rather are evidence of the
 8 "intent to induce," which is the underlying wrongful act. It is well-
 9 established that such statements are not protected by the First
 10 Amendment:

11 The first amendment does not provide a defense to a criminal
 12 charge simply because the actor uses words to carry out his
 13 illegal purpose. Crimes . . . frequently involve the use of
 14 speech as part of the criminal transaction. . . . To the extent
 15 . . . that [the defendant] appears to contend that he is immune
 16 from search or prosecution because he uses the printed word in
 17 encouraging and counseling others in the commission of a crime, we
 18 hold expressly that the first amendment does not provide a defense
 19 as a matter of law to such conduct.

20 United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982).²²

21
 22 ²²In one of the main arguments in Defendants' Opposition, Defendants
 23 offer an extended discussion of the intersection between the First
 24 Amendment and the internet. (Opp. at 18-23.) Quoting from a broad
 25 selection of caselaw, Defendants largely appear to advocate that the
 26 First Amendment immunizes any and all activity on the internet.
 Defendants' various First Amendment arguments are inapposite and
 unavailing. See Religious Tech. Ctr. v. Netcom On-Line Communications
Svcs., 907 F. Supp. 1361, 1377-78 (N.D. Cal. 1995); see generally 4
Nimmer on Copyright § 19E.03-04.

27 Notably, it appears that copyright law incorporates First
 28 Amendment considerations by providing for "fair use" defenses and by
 distinguishing between uncopyrightable "ideas" and copyrightable
 [cont'd on next page]

3. Defendants' implementation of technical features
promoting copyright infringement

Defendants' implementation of certain technical features in their web-sites is also probative of Defendants' intent to induce copyright infringement. Most obviously, Defendants' websites allow users to locate dot-torrent files. Once downloaded to a users' computer, torrent files automatically engage in a "swarm" downloading process that permits users to download a single content file simultaneously from many other users. (SUF ¶¶ 23-24.) This process expedites the exchange of large, content-rich files such as television programs and movies.

Defendant Fung also implemented a "spider" program, which locates and obtains copies of dot-torrent files from other web-sites, including well-known infringing sites such as "The Pirate Bay." (SUF, ¶¶ 86-87.) Defendant Fung additionally directs the program to specific web pages containing terms like "seinfeld-videos," which one would infer contains infringing content from the television show *Seinfeld*. (SUF, ¶ 88.)

[cont'd from prev. page]

"expressions." See Los Angeles News Svc. v. Tullo, 973 F.2d 791, 795-96 (9th Cir. 1992). Further, secondary copyright liability is sensitive to First Amendment concerns in that it generally regulates *intentional* behavior. See Grokster, 545 U.S. at 937; Amazon, 508 F.3d at 1772; cf. Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 339-41 (S.D.N.Y. 2000) ("Anything that would impose *strict liability* on a web site operator for the entire contents of any web site to which the operator linked . . . would raise grave constitutional concerns") (emphasis added), *aff'd on other grounds sub nom. Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2002).

Finally, and most importantly, it must be emphasized that the present case involves *conduct* not *expression*, and to the extent that Defendants' expression is being curtailed, they should recall that they "could have expressed their theme without copying [Plaintiffs'] protected expression." Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 759 (9th Cir. 1978), *cert. denied sub nom. O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979).

1 Defendants do not rebut this obvious inference.

2 Defendants also organized files using a program that matches
3 content filenames with specific terms. Some of the specific terms used
4 by the program describe likely infringing content, such as "Screener"
5 or "PPV".²³ (SUF, ¶¶ 91-92.)

6 Defendants no do not dispute these facts except to assert that the
7 spider programs were automated, generic components that operated in a
8 copyright-neutral manner. (SGI, ¶¶ 89-91.) Essentially, Defendants
9 argue that they merely assembled a website that combined already-
10 existing technologies, and that they did not include any unique
11 innovations that were specifically tailored to assist the distribution
12 of copyrighted works. These assertions are inapposite. The unrebutted
13 factual evidence shows that Fung designed programs which improved the
14 functioning of his websites with respect to infringing uses. Combined
15 with other evidence regarding Defendants' improper purposes, these
16 technological features support a finding of inducement liability.²⁴

17 ²³ "Screener" refers to an advance copy of a film given to critics for
18 review, while "PPV" refers to "pay-per-view." Defendants offer no
authority contesting these standard meanings.

19 ²⁴ Given that Defendants' "unlawful objective is unmistakable," see
20 Grokster III, 545 U.S. at 940, the Court refrains from addressing the
21 factual disputes regarding whether or not Defendants were
22 technologically capable of implementing filtering mechanisms to
23 reduce copyright infringement through their websites. (See SUF, ¶¶
24 103, 107; SGI ¶¶ 110-11, 143.) In Grokster III, the defendants'
25 failure to implement a copyright filter was probative circumstantial
26 evidence of the defendants' intent to induce infringement. However,
27 the failure to implement a copyright filter is not a determinative
28 factor in analyzing a defendant's inducement of infringement.
Rather, the relevant question is whether "the summary judgment record
[establishes that the defendants] acted with a purpose to cause
copyright violations by use of software suitable for illegal use."
Id. at 938. This improper purpose can be shown in a variety of ways;
the factors considered by the Supreme Court in Grokster were not
exhaustive or exclusive. See Grokster III, 545 U.S. at 938-39.

[cont'd on next page]

1 **4. Defendants' business model depends on massive infringing**
 2 **use**

3 Plaintiffs assert that Defendants' business model depended on
 4 massive infringing use. In the instant litigation, just as with the
 5 programs at issue in Grokster III, Defendants' business generates its
 6 revenue almost exclusively by selling advertising space on the sites.
 7 (SUF, ¶ 109; Pltf. Ex. 1, Fung Dep., at 326-27.) Similarly, the
 8 revenue depends on users visiting Defendants' sites and viewing the
 9 advertising. (SUF, ¶ 110.) As discussed previously, Defendant Fung
 10 acknowledges that the availability of popular works is what attracts
 11 users to the sites. (See, e.g., Ex. 173 (interview of Fung admitting
 12 that the availability of the then-popular *Da Vinci Code* film was a key
 13 attraction to his website).) Defendant Fung also solicited
 14 advertisement on the basis of the availability of works on his website.
 15 For example, in an email to a potential advertiser, moviegoods.com,
 16 Fung wrote that Isohunt would "make a great partner, since TV and
 17 movies are at the top of the most frequently searched by our visitors."
 18 (SUF, ¶ 112; Pls.' Ex 174.)

19 In short, there is no factual dispute that the availability of
 20 copyright material was a major draw for users of Fung's websites, and
 21 there is no dispute that Defendants derive revenue from the websites

22 [cont'd from prev. page]

23 In the present case, given Defendants' overwhelming affirmative
 24 conduct to encourage and assist copyright infringement, Plaintiffs
 25 are entitled to summary judgment in their favor even if Defendants
 26 were incapable of creating an effective copyright filter. Indeed,
 27 Plaintiffs have established that Defendants engaged in "[t]he classic
 28 instance of inducement . . . by advertisement or solicitation that
 broadcasts a message designed to stimulate others to commit
 violations." See Grokster III, 545 U.S. at 937. Given that
 Defendants so clearly acted to induce infringement, it is immaterial
 that they may or may not have been able to prevent such infringement
 by implementing a copyright filter.

1 and that this revenue increases along with the number of users. (SUF
2 ¶¶ 109-110, 132-133.)²⁵ This is further evidence of Defendants' intent
3 to assist infringing uses.

4 5. Additional Considerations

5 Throughout their legal memoranda and supporting evidentiary
6 papers, Defendants argue that there is no evidence of infringing
7 activity. This argument obviously fails in light of the evidence
8 discussed *supra*, Part IV.A.2. However, to the extent that Defendants
9 subjectively believe that their users have not engaged in copyright
10 infringement, Defendants' "ostrich-like refusal to discover the extent
11 to which its system was being used to infringe copyright is merely
12 another piece of evidence" of Defendants' purposeful, culpable conduct
13 in inducing third party infringement. See In re Aimster Copyright
14 Litig., 334 F.3d 643, 655 (7th Cir. 2003).

15 6. Summary of Inducement

16 The undisputed evidence shows that Defendants (both Fung and the
17 websites) engaged in "purposeful, culpable expression and conduct"
18 aimed at promoting infringing uses of the websites. See Grokster III,
19 545 U.S. at 937. Accordingly, Plaintiff's motion for summary judgment
20 on Defendants' liability for inducement of infringement is GRANTED.

21 C. Alternative Theories of Secondary Liability

22 Having determined that Defendants are liable under an inducement
23 theory for their users' infringing activities, the Court refrains from
24 addressing Plaintiff's Motion for Summary Judgment on the theories of
25 material contributory infringement and vicarious infringement.

26 ²⁵ Defendants assert that "there is no detail, no dollar amounts,"
27 (Opp. at 35), but Plaintiffs correctly point out that the present
28 Motion involves *liability* not *damages*, so such detail is unnecessary.
(Reply at 12.)

1
2 **V. DEFENDANTS' DIGITAL MILLENNIUM COPYRIGHT ACT AFFIRMATIVE DEFENSES**
3

4 The Digital Millennium Copyright Act provides affirmative defenses
5 for providers of certain internet services. In many ways, the Digital
6 Millennium Copyright Act is simply a restatement of the legal standards
7 establishing secondary copyright infringement - in many cases, if a
8 defendant *is* liable for secondary infringement, the defendant *is not*
9 entitled to Digital Millennium Copyright Act immunity; if a defendant
10 *is not* liable for secondary infringement, the defendant *is* entitled to
11 Digital Millennium Copyright Act immunity. The two sets of rules do
12 not entirely overlap, but this framework is helpful for understanding
13 the Act's statutory text and structure. Cf. A&M Records, Inc. v.
14 Napster, Inc., 239 F.3d 1004, 1025 (9th Cir. 2001) ("We do not agree
15 that . . . potential liability for contributory and vicarious
16 infringement renders the Digital Millennium Copyright Act inapplicable
17 per se.").

18 Here, the relevant section of the Digital Millennium Copyright
19 Act, 17 U.S.C. § 512(d), reads:

20 **Information location tools.**--A service provider shall not be
21 liable for monetary relief, or, except as provided in subsection
22 (j), for injunctive or other equitable relief, for infringement of
23 copyright by reason of the provider referring or linking users to
24 an online location containing infringing material or infringing
25 activity, by using information location tools, including a
26 directory, index, reference, pointer, or hypertext link, if the
27 service provider--
28

1 **(1) (A)** does not have actual knowledge that the material or
2 activity is infringing;

3 **(B)** in the absence of such actual knowledge, is not
4 aware of facts or circumstances from which infringing
5 activity is apparent; or

6 **(C)** upon obtaining such knowledge or awareness, acts
7 expeditiously to remove, or disable access to, the material;

8 **(2)** does not receive a financial benefit directly
9 attributable to the infringing activity, in a case in which
10 the service provider has the right and ability to control
11 such activity; and

12 **(3)** upon notification of claimed infringement as described in
13 subsection (c)(3), responds expeditiously to remove, or
14 disable access to, the material that is claimed to be
15 infringing or to be the subject of infringing activity,
16 except that, for purposes of this paragraph, the information
17 described in subsection (c)(3)(A)(iii) shall be
18 identification of the reference or link, to material or
19 activity claimed to be infringing, that is to be removed or
20 access to which is to be disabled, and information reasonably
21 sufficient to permit the service provider to locate that
22 reference or link.

23
24 17 U.S.C. § 512(d).

25 In other words, a provider of "information location tools" (such
26 as Defendants' websites²⁶) must satisfy the three conjunctive

27 ²⁶See Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d
28 [cont'd on next page]

1 requirements of § 512(d) in order to obtain safe harbor. These three
 2 safe harbor requirements are that the defendant: [1] does not know (§
 3 512(d)(1)(A)) or have reason to know (§ 512(d)(1)(B)) of infringing
 4 activities, or does not remove infringing materials upon receipt of
 5 such knowledge (§ 512(d)(1)(C)); and [2] does not profit from
 6 infringement where it has the power to control the infringement (§
 7 512(d)(2)); and [3] upon receiving notice (in the statutorily-
 8 prescribed manner) from the copyright holder, removes the infringing
 9 material (§ 512(d)(3)).

10 In the present case, Plaintiffs have established that Defendants
 11 have reason to know of their users' infringing activities. Defendants
 12 have not satisfied their summary judgment burden by identifying facts
 13

14 [cont'd from prev. page]

146, 1175 (C.D. Cal. 2002) ("[S]ection 512(d) . . . creates a 'safe
 15 harbor' for copyright infringement resulting from the use of
 16 information location tools by service providers, which include
 directories, indexes, references, pointers and hypertext links.").

17 Defendants also argue that they fall within the safe harbor
 18 provisions of 17 U.S.C. § 512(a) ("transitory digital network
 19 communications") and 17 U.S.C. § 512(c) ("information residing on
 20 systems or networks at direction of users"), but these categories are
 21 inapplicable to Defendants' particular technologies as well as
 22 Defendants' substantive conduct upon which Plaintiffs are suing.
 23 Defendants themselves assert that "[n]o infringing materials are
 posted on or pass through defendants' systems," (Opp. at 34), which
 is factually supported by the record because Defendants' websites are
 used to download dot-torrent files, not content files (Gribble Decl.
 ¶ 21; Fung Decl. ¶¶ 9, 52). Because infringing materials do not pass
 through or reside on Defendants' system, Defendants may not rely on §
 512(a) and § 512(c).

24 In addition, Plaintiffs claims are unrelated to secondary
 25 liability "by reason of the storage [of data] . . . on a system or
 26 network controlled or operated by" Defendants, 17 U.S.C. § 512(c)(1)
 (emphasis added), or "by reason of [Defendants'] transmitting,
 27 routing, or providing connections for[] material through a system or
 28 network controlled or operated by" Defendants, 17 U.S.C. § 512(a)
 (emphasis added). Plaintiffs' claims are premised on active
 inducement of infringement, not passive transmission or storage of
 infringing materials.

1 showing that Defendants were "not aware of facts or circumstances from
 2 which infringing activity [wa]s apparent." 17 U.S.C. § 512(d)(1)(B).
 3 Further, Defendants have not introduced any evidence that they "act[ed]
 4 expeditiously to remove, or disable access to, the [infringing]
 5 material" once they became aware that this infringing activity was
 6 apparent. (See generally Defs.' SGI ¶¶ eee-lll.) Thus, Defendants are
 7 not entitled to statutory safe harbor under 17 U.S.C. § 512(d).²⁷

8 In order to obtain safe harbor, a defendant cannot have knowledge
 9 of ongoing infringing activities. This "knowledge" standard is defined
 10 as "actual knowledge" or "willful ignorance." According to the widely-
 11 cited House and Senate Report on the law, "if the service provider
 12 becomes aware of a 'red flag' from which infringing activity is
 13 apparent, it will lose the limitation of liability if it takes no
 14 action." H.R. Rep. 105-551(II), at 53; see also Perfect 10, Inc. v.
 15 CCBill LLC, 488 F.3d 1102, 1114 (9th Cir. 2007). The Congressional
 16 Report notes that the service provider is only liable if it "turned a

17 ²⁷ The Court refrains from addressing at length the second prong of
 18 the safe harbor rule, the § 512(d)(2) "financial benefit"
 19 requirement. Defendants have profited from their users'
 20 infringement, see supra Part IV.B.5, and Defendants undisputedly have
 21 the ability to block users from Defendants' websites. (SUF ¶¶ 136-
 22 139; see also SUF ¶ 106, SGI ¶ 109; SGI ¶¶ 141-142; Fung Decl. ¶ 61.)
 As the Ninth Circuit explained in Napster, the "ability to block
 infringers' access to a particular environment for any reason
 whatsoever is evidence of the right and ability to supervise." 239
 F.3d at 1023.

23 Accordingly, Defendants have also failed to raise a triable
 24 issue of fact regarding the second requirement for receiving § 512(d)
 25 safe harbor, because they "receive a financial benefit directly
 attributable to the infringing activity," and they have "the right
 and ability to control such activity." 17 U.S.C. § 512(d)(2).

26 As for the third safe harbor requirement, there appears to be a
 27 triable issue of fact as to the adequacy of the statutory notice that
 Plaintiffs provided to Defendants. (See Parker Decl. ¶¶ 9, 12-14.)
 28 However, because Defendants have not identified any triable issues of
 facts regarding the first two safe harbor requirements, summary
 judgment is appropriate in Plaintiffs' favor.

1 blind eye to 'red flags' of obvious infringement." H.R. Rep. 105-
2 551(II), at 57. Other courts have applied this test as requiring
3 "willful ignorance of readily apparent infringement." UMG Recordings,
4 Inc. v. Veoh Networks Inc., __ F. Supp. 2d __, 2009 WL 3422839, at *7
5 (C.D. Cal. 2009) (citing Corbis Corp. v. Amazon.com, Inc., 351 F. Supp.
6 2d 1090, 1108 (W.D. Wash. 2004)).

7 Even under this stringent "willful ignorance" test, it is apparent
8 that Defendants have "turned a blind eye to 'red flags' of obvious
9 infringement." See H.R. Rep. 105-551(II), at 57. Most importantly,
10 Defendant Fung himself has engaged in unauthorized downloads of
11 copyrighted material; even if those downloads were done abroad and were
12 not actionable under United States copyright law (and thus would not
13 provide "actual knowledge" of illegal activity for purposes of 17
14 U.S.C. § 512(d)(1)(A)), Fung's actions show that Fung was aware that
15 infringing material was available on the Defendant websites. Given the
16 "worldwide" nature of the world-wide web, it would have been obvious
17 that United States-based users could access these same infringing
18 materials and thus engage in infringing acts. Defendants provide no
19 evidence to rebut this obvious conclusion that United States-based
20 users would have been able to download the same copyrighted works that
21 Fung himself downloaded.

22 Furthermore, Plaintiffs introduce evidence produced by Defendants
23 themselves that shows that approximately 25% of Defendants' websites'
24 users were based in the United States. (Horowitz Supp. Decl. ¶ 24, Ex.
25 5.) This evidence further shows that, at its height, over ten million
26 unique users visited Defendants' websites each month (see Horowitz
27 Supp. Decl., Ex. 5 at 25; Horowitz Supp. Decl., ¶ 19 n.4), which
28

1 strongly suggests that some 2.5 million United States citizens visited
2 Defendants' websites each month. Further, this evidence shows that at
3 one point, Defendants' websites were accessed over 50 million times
4 from the United States in a single month. (Horowitz Supp. Decl., Ex. 5
5 at 32.) Upon accessing Defendants' websites, these American users
6 would have found that 90% to 95% of the available materials contained
7 copyrighted content. (See Waterman Decl. ¶¶ 6, 7, 24, 28, 31.)
8 Defendants fail to introduce any evidence rebutting this overwhelming
9 evidence, and thus fail to raise a triable issue of fact as to whether
10 Defendants had actual knowledge of copyright infringement or were
11 willfully ignorant of ongoing copyright infringement.

12 There is a variety of other evidence of Defendants' willful
13 ignorance to ongoing infringement. Defendants designed their website
14 to include lists such as "Top Searches," "Top 20 Movies," "Top 20 TV
15 Shows," and "Box Office Movies," and Defendants designed these lists to
16 automatically update to reflect user activities. These lists included
17 numerous copyrighted works. (SUF ¶¶ 8-12, 47-55.) See Grokster V, 454
18 F. Supp. 2d at 992 ("it is common knowledge that most popular music and
19 movies are copyrighted"). Thus, unless Defendants somehow refused to
20 look at their own webpages, they invariably would have been known that
21 (1) infringing material was likely to be available and (2) most of
22 Defendants' users were searching for and downloading infringing
23 material.

24 In addition, Plaintiffs submit overwhelming statistical evidence
25 of the prevalence of copyrighted material available through Defendants'
26 websites. (SUF ¶¶ 5-7.) This evidence shows that 90%-95% of the
27 material was likely to be copyright infringing, a percentage that is
28

1 nearly identical to the facts in Napster, in which "eighty-seven
2 percent of the files available on Napster may be copyrighted." 239
3 F.3d at 1011. In that case, the district court rejected the
4 defendant's plainly meritless arguments seeking safe harbor under
5 § 512(d). A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 919
6 & n.24 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004
7 (9th Cir. 2001). Given that Defendants' own statistics show that
8 millions of Defendants' users are located in the United States
9 (Horowitz Supp. Decl. ¶ 24, Ex. 5), Defendants were certainly "aware of
10 a 'red flag' from which infringing activity is apparent." H.R. Rep.
11 105-551(II), at 57. Defendants do not introduce any evidence to raise
12 a triable issue of fact on this question.

13 In light of this overwhelming evidence, the only way Defendants
14 could have avoided knowing about their users' infringement is if they
15 engaged in an "ostrich-like refusal to discover the extent to which
16 [their] system[s] w[ere] being used to infringe copyright." See In re
17 Aimster Copyright Litig., 334 F.3d 643, 655 (7th Cir. 2003). In other
18 words, to avoid actual knowledge of infringement, Defendants would have
19 had to engage in willful blindness.

20 There is one last reason why Defendants are unable to benefit from
21 the 17 U.S.C. § 512 safe harbors. As stated by Judge Posner in In re
22 Aimster Copyright Litig., 334 F.3d 643, 655 (7th Cir. 2003):

23 The common element of its safe harbors is that the service
24 provider must do what it can reasonably be asked to do to prevent
25 the use of its service by 'repeat infringers.' 17 U.S.C. §
26 512(i)(1)(A). Far from doing anything to discourage repeat
27 infringers of the plaintiffs' copyrights, Aimster invited them to
28

1 do so, showed them how they could do so with ease using its
2 system, and by teaching its users how to encrypt their unlawful
3 distribution of copyrighted materials disabled itself from doing
4 anything to prevent infringement.

5 In other words, inducement liability and the Digital Millennium
6 Copyright Act safe harbors are inherently contradictory. Inducement
7 liability is based on active bad faith conduct aimed at promoting
8 infringement; the statutory safe harbors are based on passive good
9 faith conduct aimed at operating a legitimate internet business. Here,
10 as discussed *supra*, Defendants are liable for inducement. There is no
11 safe harbor for such conduct.

12 Accordingly, Defendants are not entitled to the affirmative
13 defenses provided by the Digital Millennium Copyright Act.

14
15 **VI. DEFENDANTS' RULE 56(f) REQUEST**

16
17 Defendants argue that they must conduct more discovery.
18 Defendants seek information regarding the practices of online search
19 companies such as Google and Yahoo. (Opp., at 33-35; Rothken 56(f)
20 Decl. ¶ 6.) Defendants also seek information related to the likelihood
21 that Defendants' technologies will be used for non-infringing tasks in
22 the future. (Rothken 56(f) Decl. ¶¶ 7-9.) Finally, Defendants seek
23 information related to the potential for Plaintiffs to create a
24 centralized database listing copyright-infringing works and copyright-
25 infringing users.²⁸

26
27 ²⁸ Defendants further seek information regarding the prevalence of
28 Defendants' non-United States users (Rothken 56(f) Decl. ¶ 5);
however, Plaintiffs' supplemental evidence regarding U.S.-based
[cont'd on next page]

1 Rule 56(f) requires "specified reasons" that are "essential" to
2 the opposition. Defendants meet neither requirement.

3 Such discovery is utterly irrelevant to the present Order, which
4 relates specifically to Defendants' efforts directed at inducing third
5 parties' infringement. Inducement liability does not turn on whether
6 *other actors* would or not be liable (as with Google and Yahoo), or
7 whether Defendants' websites' *future uses* might be lawful. Nor does
8 inducement liability turn on whether Plaintiffs could have mitigated
9 their damages by making efforts to reduce third party infringement.
10 Rather, inducement liability turns on whether Defendants, through their
11 own conscious conduct, actively encouraged others to infringe
12 Plaintiffs' copyrights. Defendants provide no evidence as to how the
13 further discovery would diminish their liability in the instant action.
14 Indeed, the relevant evidence, as presented by Plaintiffs' Motion for
15 Summary Judgment and discussed throughout the present Order, is largely
16 undisputed and, further, is in Defendants' possession.

17 Accordingly, Defendants' Rule 56(f) request is DENIED.
18

19 VII. CONCLUSION

20

21 This case contains the same general pattern presented in Metro-
22 Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005), A&M

23
24 [cont'd from prev. page]

25 infringement has directly answered each one of Defendants'
26 purportedly unanswered questions. Defendants failed to renew or
27 amend their Rule 56(f) request in light of Plaintiffs' new evidence,
28 and their previous requests for additional discovery have been mooted
by Plaintiffs evidence. Further, in light of the IP address-based
location methods discussed *supra*, Defendants have been in possession
of the sought-after evidence throughout the course of this
litigation.

1 Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), and,
2 more recently, Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d
3 124 (S.D.N.Y. 2009). The Defendants in the present case attempt to
4 distinguish their situation on three main grounds: first, that the
5 BitTorrent technology is different from the other technologies because
6 users do not download content files through Defendants' websites;
7 second that Defendants' conduct is protected by the First Amendment;
8 and third, that Defendants' users are located across the globe, not
9 just in the United States.

10 On the evidence presented to the Court, none of these arguments
11 raises a triable question of fact for the jury to decide. Defendants'
12 technology is nothing more than old wine in a new bottle. Instead of
13 logging into a proprietary network in order to download files from each
14 others' computers, Defendants' users access Defendants' generally-
15 accessible website in order to download those files. And instead of
16 downloading content files directly through Defendants' website,
17 Defendants' users download dot-torrent files that automatically trigger
18 the downloading of content files. These technological details are, at
19 their core, indistinguishable from the previous technologies. In fact,
20 Defendants' technologies appear to improve upon the previous
21 technologies by permitting faster downloads of large files such as
22 movies. Such an improvement quite obviously increases the potential
23 for copyright infringement.

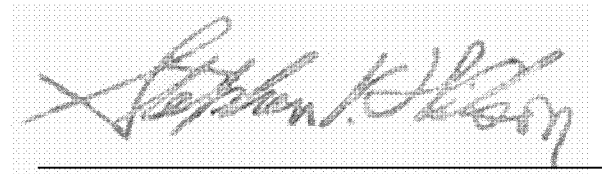
24 Regarding Defendants' second main argument, caselaw establishes
25 that Defendants are misguided if they think that the First Amendment
26 provides blanket protection to all internet-based activities,
27 particularly where those activities involve copyright infringement.
28

1 Finally, Defendants third main argument ignores the unrebutted
2 fact that millions of United States citizens have accessed Defendants'
3 websites, and a substantial proportion of the files made available to
4 them through those websites contained copyrighted or highly-likely
5 copyrighted works. Further, Plaintiffs have provided undisputed
6 evidence of specific infringing acts done in the United States.

7 Thus, as in Grokster, summary judgment is appropriate on the
8 question of inducement liability. For the foregoing reasons, the Court
9 GRANTS Plaintiff' Motion for Summary Judgment on Liability as to
10 inducement of infringement. The Court sets a status conference for
11 January 11, 2010, at 1:30 p.m.

12
13
14
15 IT IS SO ORDERED.

16
17 DATED: December 21, 2009

A handwritten signature in black ink, appearing to read "Stephen V. Wilson", is written over a horizontal line.

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE